



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel KCS

DATE: December 2, 1999

SUBJECT: MUR 4754-First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

DISTRIBUTION

COMPLIANCE

☒

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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COMMISSION
SECRETARIAT

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4754
DATE COMPLAINT FILED: 6/8/98
DATE OF NOTIFICATION: 6/11/98
DATE ACTIVATED: 5/28/99

EXPIRATION OF STATUE OF
LIMITATIONS: May 24, 2003
STAFF MEMBER: Seth H. Row

COMPLAINANT: Ray D. Sena, Chair
Democratic Party of New Mexico

RESPONDENTS: Republican Campaign Committee of New Mexico
and Laurie Fowler, as treasurer
Heather Wilson for Congress and David Archuleta,
as treasurer
Heather Wilson

RELEVANT STATUTES: 2 U.S.C. § 431(8)(B)(x)
2 U.S.C. § 431(9)(B)(viii)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(2)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. § 441d(a)
11 C.F.R. § 100.7(b)(15)
11 C.F.R. § 100.8(b)(16)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF THE MATTER

The Democratic Party of New Mexico, by and through Ray Sena ("Complainant"), its

Chair, filed a complaint alleging that the Republican Party of New Mexico ("the Party")¹ and Laurie Fowler, as treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act") by making excessive in-kind contributions to Heather Wilson and the Heather Wilson for Congress committee ("Wilson Committee") by paying for mailers and a phone bank campaign advocating Ms. Wilson's election. Ms. Wilson was the Party's nominee for the June 23, 1998 special election in New Mexico to fill the seat of the late Representative Steven Schiff.

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint and Responses

The Complaint asserts that the Party sent out mailers before June 3, 1998 which advocated Ms. Wilson's election, and asserts that the Party conducted a phone bank operation around the same time which also advocated Ms. Wilson's election. In the Complaint, Mr. Sena anticipates that the Party would claim that the mailers were not "expenditures" or "contributions" because they were covered by the "volunteer materials exemption," described at 2 U.S.C. §§ 431(8)(B)(x) and 431(9)(B)(viii). The Complaint alleges that the mailers did not qualify for the "volunteer materials exemption" because they were prepared by a commercial printer. According to the Complaint, the expenditures for the mailers and the phone bank operation were coordinated with the Wilson Committee and thus were in-kind contributions to the Wilson Committee in excess of \$5,000, in violation of 2 U.S.C. § 441a(a)(2)(A).

A photocopy of the mailer is attached to the Complaint. The mailer urged readers to "vote for Heather Wilson" and enclosed an absentee ballot application form. The Party's bulk-rate indicia appears to be hand-stamped on the mailer, while the address label appears to be

¹ The federal account of the Party is the Republican Campaign Committee of New Mexico, and is the respondent in this matter. Laurie Fowler is the treasurer of the federal account.

professionally printed directly on the mailer. The mailer states "Paid for by the Republican Party of New Mexico."

The Party, in its Response, asserts that the mailers fell within the "volunteer materials exemption" and thus were not "expenditures" or "contributions" within the meaning of the Act, see 2 U.S.C. §§ 431(8)(B)(x) and (9)(B)(viii)(1), and that the phone bank activity was a permissible in-kind contribution to the Wilson Committee, which the Party reported properly. The Party also asserts that both activities were paid for entirely with funds raised according to the limitations and prohibitions of the Act. The Wilson Committee and Ms. Wilson state that they understood that the mailers fell within the "volunteer materials exemption," and that the Wilson Committee properly reported the phone bank activity as an in-kind contribution.

This Office also notes that the Party's participation in the June 23, 1998 special election was the subject of Advisory Opinion 1998-9. In that Advisory Opinion the Republican Party of New Mexico ("NMRP") was told that certain proposed communications which mentioned the June 23, 1998 special election and contained the phrase "Vote Republican in the Special Election" would not be considered generic party disbursements and would have to be paid for entirely by the NMRP's federal account (the respondent in this MUR), and might be subject to the party expenditure limits of the Act.

B. The Phone Banks

1. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("the Act") defines "contribution" as including "any gift, subscriptions, loan, advance... or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution, loan, advance,

deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A).

Expenditures by a party committee that are coordinated² with the candidate are treated as contributions under the Act. 2 U.S.C. § 441a(a)(7)(B)(i); see also Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) (“Colorado Republican”) (holding that expenditures by a state party committee may be independent or coordinated). The Act limits to

² Definitions of “coordination” are found only indirectly in the Act and in the Commission’s regulations. The Act states that “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” 2 U.S.C. § 441a(a)(7)(B)(i); see also Buckley v. Valeo, 424 U.S. 1, 46 (1976). Applicable statutory and regulatory provisions define an expenditure as not independent when it is “made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate.” 2 U.S.C. § 431(17); see also 11 C.F.R. §§ 109.1(a) and (b)(4). The Commission’s regulations further define the concept of non-independent, and therefore coordinated, expenditures related to communications as follows:

“Made with the cooperation or with the consent of . . .

(I) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -

(A) Based on information about the candidate’s plans, projects, or needs provided to the expending person by the candidate, or by the candidate’s agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate’s committee or agent.”

11 C.F.R. § 109.1(b)(4); see also FEC v. Christian Coalition, No. 96-1781, 1999 WL 569491 (D.D.C. Aug. 2, 1999) (discussing what level of contact is needed for “expressive expenditures” to have been “coordinated” for purposes of the Act).

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\$5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute either directly or in-kind to a candidate and his or her political committee. 2 U.S.C. § 441a(a)(2)(A). Party committees also may make "coordinated party expenditures" in connection with the campaigns of the party's nominees up to Section 441a(d) limitations. See Colorado Republican, 518 U.S. at 618. The Act prohibits political committees from knowingly accepting contributions or making expenditures in violation of statutory limitations. 2 U.S.C. § 441a(f).

Contributions (whether in-kind or direct) are reported by both the party committee and the recipient candidate committee. See generally 2 U.S.C. § 434(b). Expenditures which are in-kind contributions to the candidate's committee are reported by the donor along with the date and amount of such contribution and the committee name. See 2 U.S.C. § 434(b)(6)(B)(i). The recipient committee must disclose the in-kind contribution and the year-to-date aggregate total for the donor. See 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4).

2. Analysis

The Party and the Wilson Committee acknowledge that the phone bank activity conducted by the Party was an in-kind contribution to the Wilson Committee. According to the Party, the phone bank activity was performed by automated dialing machines using phone lines at the Republican Party of New Mexico's headquarters, and charges for these phone lines were paid for during the special election entirely with federal funds. Both the Party and the Wilson Committee reported the cost of this phone bank operation, \$3,114.73, on their Post-Special Election Reports as an in-kind contribution. This contribution, when combined with other reported contributions by the Party to the Wilson Committee, was within the limits of 2 U.S.C.

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§ 441a(a)(2)(A).³

Although this contribution does not appear to be a violation of the Act, the date reported for the contribution by both the Party and the Wilson Committee raises questions as to whether the entities timely reported the contributions. The Complaint in this matter was notarized on June 3, 1998, and alleges that the phone bank activity advocating the election of Ms. Wilson occurred shortly after the mailers were sent out in late May, 1998. Both the Party and the Wilson Committee, however, reported the expenditure for this activity as having been made on the day of the special election, June 23, 1998.

More information is required to determine when in fact the phone bank activity was conducted and when the Party became obligated to pay for the phone banks. Under Commission regulations the phone bank contribution was made on the date that the Party became obligated to pay for the phone banks, or on the date the phone banks were conducted, whichever is earlier, regardless of when the phone banks were actually paid for. See 11 C.F.R. § 100.8(a)(2); see also FEC. v. American Fed'n of State, County, and Mun. Employees - P.E.O.P.L.E., Qualified, et. al., No. 88-3208 (D.D.C. July 10, 1990) (holding that in-kind phone bank contributions made by labor union PAC to candidate committee "are reportable as of the date the contributions were made, not the date of disbursements" by union PAC to pay for phone banks.) Since it is almost certain that the event which triggered the reporting obligation occurred before June 3, 1998 (the 20th day before the election, and the day the complaint in this matter was notarized), the Party and the Wilson Committee were required to report the phone bank activity as an in-kind

³ As discussed below in connection with the mailers, the phone bank activity could not have been a coordinated party expenditure pursuant to 2 U.S.C. § 441a(d) because the Party had delegated all of its Section 441a(d) expenditure authority to a national party committee. See fn. 14, infra.

contribution on their respective Pre-Special Election Reports, which they did not do. See 2 U.S.C. §§ 434(a)(4)(A)(ii)(pre-election reports of non-authorized committees shall be complete as of the 20th day before the election) and 434(a)(2)(A)(i)(pre-election reports of authorized committees shall be complete as of the 20th day before the election). Moreover, both the Wilson Committee and the Party may have violated 2 U.S.C. § 434(b) by failing to accurately report the date of the contribution since in their Post-Election Reports they reported that the contribution took place on June 23, 1998.

For the reasons stated above, this Office recommends that the Commission find no reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) in connection with phone bank activity carried out on behalf of Heather Wilson for Congress, and recommends that the Commission find no reason to believe that Heather Wilson and Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. § 441a(f) in connection with phone bank activity conducted by the Republican Campaign Committee of New Mexico. However, for the reasons stated above, this Office recommends that the Commission find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. §§ 434(a)(4)(A)(ii) and 434(b), and find reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. §§ 434(a)(2)(A)(i) and 434(b).

C. The Mailers

Complainant also alleges that certain mailers sent out by the Party, described above, were an excessive in-kind contribution to the Wilson Committee. The Party asserts that the mailers could not have been a contribution because they were covered by the "volunteer materials exemption." The questions raised by this allegation are: 1) whether the mailers were covered by

the "volunteer materials exemption;" and 2) if the mailers were not covered by the exemption, whether the mailers were an in-kind contribution to the Wilson Committee.

1. The Volunteer Materials Exemption

a) **Applicable Law**

The Act defines "contribution" as including "any gift, subscriptions, loan, advance... or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A).

The Act exempts from the definitions of "contribution" and "expenditure" the payment by a state party committee of the cost of campaign materials used by the committee in connection with volunteer activities on behalf of nominees of the party, provided, inter alia, that the payment is not for materials used in connection with "any broadcasting... direct mail, or similar type of general public communication or political advertising." 2 U.S.C. §§ 431(8)(B)(x)(1) and 431(9)(B)(viii)(1). For the purposes of this "volunteer materials exemption," direct mail is "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." 11 C.F.R. §§ 100.7(b)(15)(i) and 100.8(b)(16)(i). Materials purchased with funds given by a national party committee to a state committee for the purchase of such materials do not qualify for the exemption. 11 C.F.R. §§ 100.7(b)(15)(vii) and 100.8(b)(16)(vii). Also, the materials must be distributed by volunteers, and not by a commercial vendor. 11 C.F.R. §§ 100.7(b)(15)(iv) and 100.8(b)(16)(iv).⁴

⁴ Mailers which qualify for the volunteer materials exemption are required to state who paid for them, but are not required to carry an authorization notice. See 11 C.F.R. (cont'd. next page)

b) Analysis

Both the Complaint and the Party's Response make conclusory statements about whether or not the mailers qualified for the volunteer materials exemption, without specifically addressing the statutory elements of the exemption, and without addressing a number of the factors that the Commission has looked to in the past when examining similar cases of the application of the exemption. In the past, the Commission has looked at various factors in attempting to "reconcile the volunteer activity contemplated by [the Act] with the commonplace (and increasingly advanced) services provided by commercial printers in producing direct mail materials for 'distribution' by volunteers through the mails." Statement of Reasons, MUR 3218, (Blackwell for Congress) May 23, 1991, at 2. In past cases the Commission has analyzed whether mailers qualified for the exemption by examining factors including whether a commercial mailing list or national party funds were used for the mailer, and the degree of "volunteer involvement" in a particular mailer. In this case, there does not appear to be enough information to determine whether the mailers qualified for the exemption based on these factors.

1) Did the Party Use a Commercial Mailing List?

Neither the Complaint nor the Party's response give any indication as to whether a commercial list was used in preparing the mailers. Nor is it obvious from the Party's expenditure reports whether the Party made any disbursements to purchase mailing lists in the relevant time period. If a commercial list was used, then the mailers could not have qualified for the "volunteer materials exemption." See 11 C.F.R. §§ 100.7(b)(15)(i) and 100.8(b)(16)(i). More information is required to determine how the Party developed the list used for the mailers.

§ 110.11(a)(4). The mailers at issue in this case stated that they were paid for by the Republican Party of New Mexico.

2) Were Volunteers Sufficiently Involved?

Commission regulations require that "volunteer exempt" mailers not be "direct mail," which in part means that they not be made "by a commercial vendor," 11 C.F.R. §§ 110.7(b)(15)(i) and 100.8(b)(16)(i), and that the mailers not be "distributed by a commercial vendor." 11 C.F.R. §§ 100.7(b)(iv) and 100.8(b)(16)(iv). In past cases the Commission has analyzed both factors together by examining the overall degree of volunteer involvement. Specifically, the analysis of whether mailers were made "by a commercial vendor" has included the question of whether the mailers were transported to the post office, which is also a factor the Commission has considered when deciding whether mailers were "distributed by a commercial vendor." As part of the inquiry considering volunteer involvement, the Commission also has looked at factors such as whether volunteers stamped the bulk mailing permit on the mailers, and whether volunteers sorted the mail pieces by zip code and postal carrier route.

This Office believes that the question of whether there was sufficient volunteer involvement with these mailers to qualify the mailers for the exemption requires further investigation. The Party asserts that volunteers played a substantial role in processing, sorting, and delivering the mailers. Specifically, the Party states that its volunteers "unloaded the mail at party headquarters... stamped the party's non-profit indicia" on the mailers, "bundle[d] the mail... and took the mail to the U.S. Post Office, where the volunteers unloaded the mail." The Party submits copies of volunteer sign-in sheets to back up this claim. These lists contain the names and phone numbers of more than thirty volunteers, and the date that they volunteered. "1st Absentee" is handwritten on the top of the sign-in lists.⁵

⁵ This notation on the sign-in sheets appears to refer to the fact that the mailers advocating Wilson's election contained an absentee voter registration form.

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Neither the Complaint nor the Party's Response, however, addresses whether it was volunteers or the vendor who sorted the mail by zip code and mail carrier route. Although the Party's Response refers to volunteers "bundling" the mail, it is not known whether this term includes the task of sorting the mailers by zip code and postal route number. The Commission emphasized the importance of volunteers performing this task, rather than a vendor, when confronted by a factual situation very similar to this one in MUR 3218. In that matter, the vendor printed the addresses on the mailers in sequential order according to zip code and carrier route number, and gave them to the volunteers in this order. The Commission stated that although "sequential address labeling by the printer may have made batching of the mailing by zip code and carrier route considerably simpler, [it] did not eliminate that step." Statement of Reasons, MUR 3218, May 23, 1991, at 3. The Commission has found this factor to be important in several other cases as well. See Statement of Reasons, MUR 4471 (Montana State Democratic Committee), November 19, 1998, at 5; see also MURs 2377 (Republican Party of Texas), 3218, and 3248 (New York Democratic Party). In this case the Party's response does not state one way or the other whether sorting was performed by the volunteers, or the vendor.⁶ More information is required to determine if volunteers sorted the mailers before transporting them to the post office.⁷

⁶ In order to qualify for the bulk postage rate, the mailers must have been sorted by zip code and postal carrier route.

⁷ Several other factors examined by the Commission in the past are addressed by the Party's Response. For example, here volunteers appear to have transported the mail to the post office and stamped the bulk mail indicia on the mailers, unlike past cases in which the Commission found that there had not been sufficient volunteer involvement because mailers were transported to the Post Office by a vendor. See MURs 2559 (Oregon Republican Party) and 2288 (Shimizu for Congress). In addition, it appears that volunteers stamped the Party's bulk mail indicia on the mailers, another factor considered by the Commission in the past. See (cont'd. next page)

3) National Party Funds

As noted above, if national party committee funds were used by the state Party to pay for the mailers, the mailers could not have qualified for the volunteer materials exemption. See 11 C.F.R. §§ 100.7(b)(15)(vii) and 100.8(b)(16)(vii). It is unclear if national party funds were used to pay for these mailers. The Party received \$75,000 from the National Republican Congressional Committee ("NRCC") three weeks before the mailers apparently were sent, \$21,000 from the NRCC a few days before the mailers appear to have gone out, and \$2,000 from the NRCC after the Party appears to have begun paying for the mailers. From the Party's reports filed with the Commission it appears that the Party may have spent as much as \$170,804.66 on the mailers. This total is derived from adding all of the disbursements in the Party's Post-Election Report marked "volunteer exempt mail" for the period, June 4, 1998 to July 13, 1998. (The Party made no disbursements marked "volunteer exempt" during the Pre-Election Reporting period.). It is unclear, however, if the Party mailed or produced more than one mailer that it designated "volunteer exempt" in this period, or if it consistently labeled expenditures made in connection with the mailing advocating Wilson's election as "volunteer exempt."

The Party had roughly \$203,313.37 in its accounts during the period in which it appears to have been paying for the mailers, excluding the funds from the NRCC. Of this amount, \$107,404 was cash on hand at the beginning of the period, and \$95,909.37 was contributions received during the period. As noted above, the Party may have spent as much as \$170,804.66 during this period on the mailers. It is difficult to determine, without performing a detailed "first-in, first-out" type of analysis, and without knowing how much was actually spent on the

Statement of Reasons, MUR 3218, May 23, 1991, at 3 (discussing volunteers stamping postage on "exempt" mailers as a factor in application of exemption.)

mailers, whether at all points during the period in which it was paying for the mailers the Party had enough cash on hand so that it could make the disbursements for the "volunteer exempt" mailers without dipping into the funds which it received from the NRCC.⁸

This Office recommends that the Commission gather more information about this issue, particularly about how much the Party actually spent on the mailers. If the NRCC paid for only a portion of the cost of the mailers, it would be possible to conclude that the entire cost of the mailers may not have qualified for the exemption, or to conclude that only that portion of the cost of the mailers paid for with NRCC funds did not qualify. See Common Cause and John K. Addy v. FEC, No. 94-0214 and No. 94-02112 (D.D.C. March 29, 1996) (holding inter alia that Commission's regulations could support either conclusion).

For all the reasons set forth above, this Office recommends that the Commission make the reason-to-believe findings detailed below.⁹

⁸ Because the Commission does not know how much the Party spent on the mailers, this case is unlike a recent case where the Commission found it unlikely that national party funds were used to pay for mailers which a state party committee claimed fell within the "volunteer materials exemption." See Statement of Reasons, MUR 4471, November 19, 1998. In that case, because the respondent state party committee's response to the complaint stated how much it had spent on the mailers and when it had spent the funds, the Commission was able, after a brief examination of the receipts and disbursements of the committee, to determine that the committee could have paid for the mailers without national party committee funds. Id. at 6.

⁹ This Office also notes generally that the Party's Response was not submitted under oath, and did not include any documentation as to the services performed by its vendors or its volunteers beyond the volunteer sign-in sheets. In past "volunteer materials exemption" cases the Commission has had the benefit of affidavits and documentary materials, such as invoices from printers, to assist it in determining how much of any mailing operation was performed by vendors, and how much was performed by volunteers. See, e.g., MURs 4471 and 3218. While the lack of statements under oath and documents alone is not dispositive in this case, it does support the need for further investigation.

2. In-Kind Contribution/Independent Expenditure

a) Applicable Law

If campaign materials paid for by a party committee do not qualify for the "volunteer materials exemption," then the party committee has made an "expenditure" or a "contribution" under the Act. An expenditure for communication materials, such as direct mail, may be an independent expenditure if the communication was not coordinated with the candidate. See Colorado Republican, 518 U.S. at 604. If there was coordination with the candidate, the communication may be a "coordinated party expenditure," see 2 U.S.C. § 441a(d), or an in-kind contribution.

Party committees may make both direct and in-kind contributions to candidates up to \$5,000, and also may make "coordinated party expenditures" in connection with the campaigns of the party's nominees up to Section 441a(d) limitations.¹⁰ See Colorado Republican, 518 U.S. at 618. A state party committee may assign its coordinated party expenditure limitation to a national committee of the party, thereby designating that committee as its agent for purposes of making coordinated party expenditures. See FEC v. Democratic Senatorial Campaign Committee, 484 U.S. 27 (1981). If a state party committee so assigns its Section 441a(d) authority, the committee is incapable of making Section 441a(d) coordinated party expenditures,

¹⁰ Pursuant to 2 U.S.C. § 441a(d)(3)(B) and 11 C.F.R. § 110.7(b)(2)(ii), the national committee and state committee of a political party may each make expenditures in connection with the general election campaigns of candidates for the United States House of Representatives in that State. The limit set out at 2 U.S.C. § 441a(d)(3)(B) is adjusted at the beginning of each calendar year based upon changes in the Consumer Price Index. The limit for each 1998 general election in New Mexico for a U.S. House seat was \$32,550. 2 U.S.C. § 441a(c); 11 C.F.R. § 110.9(c).

and an expenditure made in coordination with a candidate would be no different than any other in-kind contribution limited by Section 441a(a). See 2 U.S.C. § 441a(a)(7)(B)(i). If a state party committee designates a national committee as its agent, the combination of such coordinated expenditures with direct contributions to a candidate may not exceed the \$5,000-per-election limitation of Section 441a(a)(2)(A); otherwise, a violation of 2 U.S.C. § 441a(a) will have occurred.¹¹

Expenditures not made pursuant to Section 441a(d) that are coordinated¹² with the candidate are treated as contributions under the Act. 2 U.S.C. § 441a(a)(7)(B)(i). The Act limits to \$5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute to a candidate and his or her political committee. 2 U.S.C. § 441a(a)(2)(A). The Act prohibits political committees from knowingly accepting contributions or making expenditures in violation of statutory limitations. 2 U.S.C. § 441a(f).

Communications that call for the election or defeat of a clearly identified candidate constitute express advocacy. 11 C.F.R. § 100.22(a). Commission regulations define "express advocacy" to include such phrases as "vote for the President," "Smith for Congress," "support the Democratic nominee" or "cast your ballot for the Republican challenger for U.S. Senate in Georgia," or other words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate.¹³ Id.

¹¹ This limitation applies to all multicandidate political committees. 2 U.S.C. § 441a(a). The Party is a qualified multicandidate committee.

¹² See fn. 2, supra.

¹³ The Commission's definition of express advocacy also includes a standard which is contained in 11 C.F.R. § 100.22(b). This portion of the regulations, which has been held unconstitutional by the First Circuit, Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir, 1996), cert. denied, 118 S. Ct. 52 (1997), implicitly rejected by the Fourth Circuit, FEC v. (cont'd. next page)

Disbursements for communications that expressly advocate the election or defeat of a clearly identified candidate and that are not made in coordination with the candidate are "independent expenditures." 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. Independent expenditures are not limited by the Act, but must come entirely from funds subject to the limitations and prohibitions of the Act.

A party committee that makes independent expenditures has specific reporting requirements. The party committee must report the name and address of the candidate to whom the expenditure pertains, including the date, amount, and purpose of the independent expenditure. 2 U.S.C. § 434(b)(6)(B)(iii). The party committee must further indicate whether the expenditure is in support of, or in opposition to, a candidate, and certify, under penalty of perjury, that the expenditure was not made in coordination with the candidate. Id.

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall contain a disclaimer. 2 U.S.C. § 441d(a); see also 11 C.F.R. § 110.11(a)(1). For such a communication, the disclaimer must explicitly state both who paid for it and whether or not it was authorized by any candidate or campaign committee. 2 U.S.C. §§ 441d(a)(1)-(3); but see FEC v. Public Citizen, No. 1:97-CV-358-RWS, slip op. at 20 (N.D. Ga. Sept. 15, 1999).

Contributions (whether in-kind or direct) are reported by both the party committee and the recipient candidate committee. See generally 2 U.S.C. § 434(b). Expenditures which are in-kind contributions to the candidate's committee are reported by the donor along with the date and

Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997), and which has recently been challenged in the Eastern District of Virginia, Virginia Soc'y for Human Life v. FEC, No. 3:99CV559 (E.D.Va. filed Aug. 9, 1999), is not at issue in this case.

amount of such contribution and the committee name. See 2 U.S.C. § 434(b)(6)(B)(i). The recipient committee must disclose the in-kind contribution and the year-to-date aggregate total for the donor. See 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4). Contributions received by candidate committees more than 20 days before any election are required to be reported on a Pre-Election Report. See 2 U.S.C. § 434(a)(2)(A)(i). Contributions by committees other than authorized candidate committees made more than 20 days before an election are also required to be reported on a Pre-Election Report. See 2 U.S.C. § 434(a)(4)(A)(ii).

b) Analysis

The Complaint alleges that the Party's expenditures for the mailers were an in-kind contribution because the mailers were coordinated with the Wilson Committee. The Commission need not resolve this issue if it determines that the mailers qualified for the "volunteer materials exemption." Because the record is inconclusive as to whether the mailers were coordinated or independent, see Colorado Republican, 518 U.S. at 618, this Office recommends that the Commission find reason to believe that the Party violated 2 U.S.C. § 441a(a)(2)(A) and that the Wilson Committee violated 2 U.S.C. § 441a(f). This would permit the Commission to examine the degree of coordination, if any, about the mailers.

If the expenditure for the mailers was coordinated with the Wilson Committee, the Party may have violated the \$5,000 per election limit in 2 U.S.C. § 441a(a)(2)(A) ¹⁴ in an amount close

¹⁴ This Office notes that the mailers could not have been a "coordinated party expenditure" under Section 441a(d). As noted above, the state party and the national party committee were each permitted to make up to \$32,550 in coordinated party expenditures on behalf of Ms. Wilson in 1998 under Section 441a(d). Here, it appears that the Republican Campaign Committee of New Mexico delegated its coordinated party expenditure authority to the National Republican Congressional Committee ("NRCC"). The NRCC reported making \$63,000 in coordinated expenditures on behalf of Heather Wilson for Congress in June, 1998, and indicated on its report to the Commission for that period that it had received written authorization from the state Party (cont'd. next page)

to the whole cost of the mailers.¹⁵ The Party also may have violated 2 U.S.C. §§ 434(b) and 434(a)(4)(A)(ii) by failing to report the expenditure as a contribution to the Wilson Committee on its Pre-Special Election Report. This Office recommends that the Commission find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer violated 2 U.S.C. §§ 441a(a)(2)(A), 434(a)(4)(A)(ii) and 434(b) in connection with mailers advocating the election of Ms. Wilson.

If the Wilson Committee coordinated the mailers with the Party, it may have violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive in-kind contribution in an amount close to \$140,000. Also, if the Wilson Committee received the in-kind contribution of the mailers before June 3, 1998 it was required to report the contribution on its Pre-Special Election Report, which it did not do. See 2 U.S.C. §§ 434(b) and 434(a)(2)(A)(i). This Office recommends that the Commission find reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. §§ 441a(f), 434(a)(2)(A)(i) and 434(b) in connection with mailers sent out by the Party advocating Ms. Wilson's election. Because the complaint makes no allegations as to Ms. Wilson's personal involvement with the mailers, this Office recommends that the Commission find no reason to believe that Heather Wilson violated the Act in connection with mailers sent out by the Party advocating her election.

Under an alternative theory, if the expenditure for the mailers was not coordinated with the Wilson Committee, the expenditure may have been an independent expenditure by the

to use the state Party's Section 441a(d) expenditure limit. Also, in this matter it does not appear that there is any question about whether the mailers were express advocacy, as the mailers stated "Vote for Heather Wilson."

¹⁵ The value of the mailers appears to have been over \$170,000, and the Party had already made close to \$5,000 in in-kind contributions by the time the mailer was sent.

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Party.¹⁶ If the mailers were an independent expenditure, the Party may have violated the Act by not properly reporting the expenditure. The Party appears to have reported expenditures for the mailers on Schedule B of the post-election report; if the mailers were an independent expenditure they should have been reported on a Schedule E form and labeled as expenditures on behalf of the Wilson Committee, with a certification that the mailers were not coordinated with any candidate or committee. See 2 U.S.C. § 434(b)(6)(B)(iii). Furthermore, because the mailers appear to have been sent out before June 3, 1998 (more than 20 days before the election), the Party may have violated 2 U.S.C. § 434(a)(4)(A)(ii) by failing to report the independent expenditure on its Pre-Special Election Report.

For the reasons stated above as to this alternative theory, this Office recommends that the Commission find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. §§ 434(b)(6)(B)(iii) and 434(a)(4)(A)(ii) by failing to report independent expenditures on behalf of Heather Wilson for Congress.

c) Disclaimer Issue

Whether or not the mailers were coordinated with the Wilson Committee, if the mailers were not covered by the "volunteer materials exemption" the Party may have violated 2 U.S.C. § 441a(d), because the mailers did not include a sufficient disclaimer. The mailer stated "Paid for by the Republican Party of New Mexico." If the mailers were an independent expenditure, they should have also communicated that they were "not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3). If the mailers were an in-kind contribution

¹⁶ As noted above, the mailers would qualify as an independent expenditure if there was no coordination, and the mailers were not otherwise exempt, because the mailers expressly advocated the election of Heather Wilson. See 2 U.S.C. § 431(17).

because they were coordinated with the committee, they should have communicated that they were authorized by Heather Wilson for Congress. 2 U.S.C. § 441d(a)(2). Therefore, this Office recommends that the Commission find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. § 441d(a) by failing to include a sufficient disclaimer on mailers advocating the election of Heather Wilson.

III. DISPOSITION AND PLAN FOR DISCOVERY

In connection with the phone bank activity, this Office will seek more information about when the phone banks were operated and when the Party became obligated to pay for them in order to establish a date on which the contribution of the phone banks should have been reported. With respect to the mailers, this Office recommends that the Commission utilize a two-step approach to the investigation. In the first step, this Office will seek information from the Party to enable the Commission to further analyze whether the mailers qualified for the "volunteer materials exemption," including whether national party committee funds were used to pay for the mailers. If it becomes clear that the mailers did not qualify for the volunteer materials exemption, this Office will report to the Commission and seek subpoenas to the Party and to the Wilson Committee to ascertain whether the Party's expenditure for the mailers was coordinated with the Wilson Committee.

Accordingly, this Office recommends that the Commission authorize the attached subpoena and order to the Party (Attachment 1) in order to ascertain when the phone bank expenditure was obligated, and, in connection with the mailers and the "volunteer materials exemption," whether a commercial mailing list was used for the mailers, whether volunteers sorted the mailers by zip code and postal carrier route, and whether national party committee funds were used to pay for the mailers.

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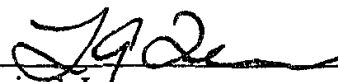
IV. RECOMMENDATIONS

1. Find no reason to believe that Heather Wilson and Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. § 441a(f) in connection with phone bank operations conducted by the Republican Campaign Committee of New Mexico.
2. Find no reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) in connection with phone bank operations carried out on behalf of Heather Wilson for Congress.
3. Find reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. §§ 434(a)(2)(A)(i) and 434(b) in connection with phone bank operations conducted by the Republican Campaign Committee of New Mexico.
4. Find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. §§ 434(a)(4)(A)(ii) and 434(b) in connection with phone bank operations carried out on behalf of Heather Wilson for Congress.
5. Find reason to believe that the Republican Campaign Committee of New Mexico and Laurie Fowler, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A), 434(b), 434(a)(4)(A)(ii) and 441d(a) in connection with mailers sent out by the Party advocating the election of Heather Wilson.
6. Find reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. §§ 441a(f), 434(a)(2)(A)(i) and 434(b) in connection with mailers sent out by the Party advocating the election of Heather Wilson.
7. Find no reason to believe that Heather Wilson violated the Act in connection with mailers sent out by the Party advocating her election.

8. Approve the attached subpoena and order.
9. Approve the attached Factual and Legal Analyses.
10. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

20.04.398.0058
Date 12/1/99

BY: 
Lois G. Lerner
Associate General Counsel

Attachments:

1. Subpoena and Order
2. Factual and Legal Analyses (3)



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

FROM: Mary W. Dove/Lisa R. Davis
Acting Commission Secretary

DATE: December 7, 1999

SUBJECT: MUR 4754 - First General Counsel's Report
dated December 1, 1999.

The above-captioned document was circulated to the Commission
on **Thursday, December 02, 1999.**

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	<u>XXX</u>
Commissioner Thomas	—
Commissioner Wold	

This matter will be placed on the meeting agenda for **Tuesday, December 14, 1999.**

Please notify us who will represent your Division before the Commission on this matter.